No. 219

In the Supreme Court of the United States

OCTOBER TERM, 1967

THE PEORIA TRIBE OF INDIANS OF OKLAHOMA, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
HAROLD S. HARRISON,
Acting Assistant Attorney General,
ROBERT S. RIFKIND,
Assistant to the Solicitor General,
ROGER P. MARQUIS,
WILLIAM M. COHEN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

284-162—67——1

Cases—Continued

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OPINIONS BELOW

The majority and dissenting opinions of the Court of Claims (A. 68–81) are reported at 369 F. 2d 1001. The opinion of the Indian Claims Commission (A. 53–66) is reported at 15 Ind. Cl. Comm. 123.

JURISDICTION

The judgment of the Court of Claims was entered on December 16, 1966 (A. 2). A petition for rehearing was denied on March 17, 1967 (A. 101). The peti-

tion for a writ of certiorari was filed on June 5, 1967, and was granted on October 9, 1967. The jurisdiction of this Court is invoked under 25 U.S.C. 70s(c) and 28 U.S.C. 1255(1).

TREATY INVOLVED

The Treaty of May 30, 1854, (10 Stat. 1082) between the United States and petitioners is set forth in the Appendix at pp. 101–109.

QUESTION PRESENTED

An Indian treaty provided that the President, upon consultation with the Indians, was to turn over to them some portion of the proceeds from the sale of their lands, and to invest the remainder in safe and profitable stocks for their benefit. The question presented is whether that provision requires the payment of interest on a judgment against the United States compensating the Indians for the low price realized upon the sale of the lands.

STATEMENT

By the Treaty of May 30, 1854, (10 Stat. 1082; A. 101–109), the Peoria Tribe[1] ceded to the United States certain tracts of land, embracing some 350,000 acres, in what is now the State of Kansas. From the aggregate cession, the treaty reserved to the Indians 160 acres for each member of the tribe and 10 sections to be held as the common property of the tribe

[1] Petitioners, the Peoria Tribe of Indians of Oklahoma, were formerly known as the Confederated Tribe of the Peoria, Kaskaskia, Wea and Piankeshaw Indians (A. 4).

(Article 2). Pursuant to that reservation, more than 140,000 acres were selected for retention by the Indians in the manner prescribed in Article 3 (A. 38). Article 4 provided that the remaining lands, which proved to be approximately 208,585 acres (A. 38), were to be offered for sale at public auction and that those not so sold should be subject to private entry at the minimum price of public lands, subject to further reductions in price from time to time. The United States agreed to pay to the Indians the moneys arising from the sales after deducting survey, management and sale costs. The method by which such payment should be made was specified in Article 7, which provided in relevant part:

> * * * And as the amount of the annual receipts from the sales of their lands, cannot now be ascertained, it is agreed that the President may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement.

The execution of the treaty coincided with the organization of Kansas as a territory (10 Stat. 277) and the extension to the territory of the provisions of the pre-emption law under which settlers could acquire title to unoccupied public lands at $1.25 per acre. In a remarkably short period of time, the territory was widely overrun by both *bona fide* settlers and land speculators who staked claims to lands, in-

cluding lands that were to be held for sale under the Peoria treaty (A. 36). In consequence, by the time the surveying and appraisal preliminary to sale had been completed, it was recognized that sale at public auction might in many cases involve the ouster of settlers who, in reliance on the pre-emption law, had chosen land, made improvements, commenced farming and the like. So tense did this situation become as the time for sale approached that the federal garrison at Fort Leavenworth was alerted to the possible need for military assistance in the conduct of the sales (A. 39). In all events, it appears that settlers, and perhaps others, were permitted to buy land at the appraised prices rather than at genuine auction prices. The sale was conducted from June 24, 1857 to July 13, 1857; during that period, 207,758.85 acres were sold for a total $346,671.09 or an average of $1.67 per acre. (A. 42). It is undisputed that that sum was appropriately applied for petitioners' benefit in accordance with the treaty.

After detailed examination of the circumstances surrounding the sale and of the prices at which land subsequently sold, the Indian Claims Commission concluded that "a fair market value for the parcels which were sold in June and July, 1857, would have averaged $2.50 per acre," that the sale should therefore have produced an aggregate of $519,397.13, and that petitioners are entitled to recover the difference between that and the amount actually received, *i.e.*, $172,726.04 (A. 65). The Commission denied petitioners' claim for interest on that award, noting: "The rule is well es-

tablished that the United States is immune from the burden of interest, in the absence of a contractual or statutory requirement. * * * There is no contract or statutory requirement for the payment of interest in this case" (A. 66). The Court of Claims affirmed (A. 68–81).[2]

SUMMARY OF ARGUMENT

It is well settled that the United States is not liable for interest, except on claims for just compensation under the Fifth Amendment, unless it has expressly consented to such liability by treaty, statute or contract. Petitioners do not challenge that rule; nor do they contend that their underlying claim is one arising under the Fifth Amendment. Furthermore, the government's general immunity from interest is subject to no special exception in favor of Indians. Neither any supposed fiduciary relationship between the United States and Indian tribes nor any provision of Indian Claims Act relieves Indian claims from the traditional rule that interest on claims against the United States cannot be recovered in the absence of express assent to such liability by statute or contract. Accordingly, this case presents only the narrow question whether the Treaty of 1854 provides such assent.

The language in the Treaty of 1854, on which petitioners ultimately rely, provides that the President may from time to time, and in consultation with the Indians, determine how much of the proceeds of the

[2] Two judges dissented from the denial of interest (A. 75–81). Petitioners also challenged another aspect of the Commission's decision which is not in issue here.

sales of the former Indian lands shall be paid to the Indians and how much shall be "invested in safe and profitable stocks, the interest to be annually paid to them" (Article 7). We urge, first, that this provision does not constitute an undertaking by the United States to pay interest, but rather an undertaking to manage an investment portfolio for the Indians. In this respect the Treaty of 1854 is to be distinguished from numerous other treaties providing for the payment of interest at specified rates on funds deposited in the federal Treasury which clearly carry an obligation by the United States to pay interest. Indeed, there is persuasive evidence that the Treaty of 1854 reflected a policy decision that it was a mistake to retain Indian funds in the Treasury, that investing the principal of such funds in the securities of the States would be good for the economy and would relieve the federal government of the burden of annual interest payments. If, as we believe, the Treaty of 1854 did not obligate the United States to pay interest at all, it clearly did not obligate it to pay interest in the circumstances presented here.

Even if the treaty should be deemed an undertaking to pay interest, we urge, secondly, that it does not authorize the imposition of interest on the present award. At most the treaty authorized the payment of interest (a) on the proceeds received from the sale of land, (b) which are allocated by the President for investment rather than to be paid over to the Indians, and (c) which are actually invested. The underlying award on which interest is sought here satisfies none

of those conditions. It would be speculation to attempt to determine what proportion of the award would have been allocated for investment had it been available in 1857—a matter that Congress left to the President's discretion. It would also be conjecture to attempt to determine what income would have been realized had some or all of the award been invested in 1857. The investments that were actually made produced the highly variable results that even the most prudently purchased securities encounter. Not only were there purchases of State bonds paying widely varying rates of interest, but some of the States whose bonds were held defaulted on them. The conjecture and surmise involved in attempting to determine the amount of interest that the treaty authorizes serve to demonstrate that Congress has not made the United States liable for interest in these circumstances.

The problem is not the result of any ambiguity in the treaty which could be resolved by resort to canons of construction. Rather, the difficulty is precisely that the treaty clearly does not provide for these circumstances, that the limited conditions upon which the payment of interest is authorized do not obtain here and, hence, that the treaty fails to supply the congressional assent that petitioners require. The situation is in no way altered by the fact that the failure to satisfy the conditions of the treaty results from the failure of the United States to sell the lands in the prescribed manner. Every claim against the United States is predicated on some dereliction or default, but a liability for interest arises only where there is

express provision therefor. The Treaty of 1854 makes no such provision.

ARGUMENT

CONGRESS HAS NOT ASSUMED A LIABILITY TO PAY INTEREST IN THIS CASE

A. INTEREST MAY BE CHARGED AGAINST THE UNITED STATES ONLY WHEN CONGRESS EXPLICITLY ASSUMES SUCH OBLIGATION.

The law is clear, and is not here challenged, that the United States is not liable for interest on claims unless it has, by contract or statute, expressly consented in "affirmative, clear-cut, unambiguous" terms. *United States* v. *Thayer-West Point Hotel Co.,* 329 U.S. 585, 590; *United States* v. *Goltra,* 312 U.S. 203, 207. Recognizing this immunity as an aspect of sovereign immunity which can be waived only by congressional consent, this Court has held that "[c]ourts lack the power to award interest against the United States" except where authorized by "express language in a statute or contract." *United States* v. *N.Y. Rayon Importing Co.,* 329 U.S. 654, 663. Cf. *United States* v. *Shaw,* 309 U.S. 495, 500–501; *Minnesota* v. *United States,* 305 U.S. 382, 388–389; *Case* v. *Terrell,* 11 Wall. 199. The only qualification to the rule is that interest has been regarded as an element of the constitutionally required just compensation for the taking of property under the Fifth Amendment. *Smyth* v. *United States,* 302 U.S. 329, 353; *Albrecht* v. *United States,* 329 U.S. 599; *Seaboard Air Line Railway* v. *United States,* 261 U.S. 299, 306; *United States* v. *Creek Nation,* 295 U.S.

103, 111.[3] But no such claim under the Fifth Amendment is asserted in this case (A. 72).

No exception to this immunity has been recognized with respect to the claims of Indian tribes. Indian claims, like all others, have invariably been limited by "the 'traditional rule' that interest on claims against the United States cannot be recovered in the absence of an express provision to the contrary in the relevant statute or contract." *United States* v. *Alcea Band of Tillamooks,* 341 U.S. 48, 49. Accord, *Cherokee Nation* v. *United States,* 270 U.S. 476, 486–496; *United States* v. *Omaha Tribe of Indians,* 253 U.S. 275, 281–283; *Loyal Creek Indians* v. *United States,* 118 C. Cls. 373, 97 F. Supp. 426, certiorari denied, 342 U.S. 813; *Pawnee Indian Tribe of Oklahoma* v. *United States,* 157 C. Cls. 134, 138–140, certiorari denied, 370 U.S. 918; *Confederated Salish & Kootenai Tribes* v. *United States,* 175 C. Cls. 451, certorari denied, 385 U.S. 921; *Nez Perce Tribe of Indians* v. *United States,* 176 C. Cls. 815, 829–830, certiorari denied, 386 U.S. 984. Nor is the rule relaxed by reason of any fiduciary relationship between the United States and Indian tribes. Indeed, the general principles of the law of trusts, to which petitioners repeatedly allude (Br. for Petitioners, pp. 3, 6, 9, 13) clearly have no relevance here, since the enforceable

[3] On the other hand, neither a statute nor a contract providing for "just compensation" is deemed sufficiently explicit to authorize an award of interest. *United States* v. *Thayer-West Point Hotel Co.,* 329 U.S. 585; *United States* v. *Goltra,* 312 U.S. 203.

duties and liabilities of the United States, unlike those of a private trustee, are measured by specific language in acts or treaties and not by rules of courts of equity. See *Iowa Tribe of the Iowa Reservation in Oklahoma* v. *United States,* Ct. Cls. No. 9–65, decided March 17, 1967, certiorari denied, October 16, 1967, No. 221, this Term; *Skokomish Indian Tribe* v. *France,* 269 F. 2d 555, 560 (C.A. 9). Finally, petitioners do not suggest that the Indian Claims Commission Act itself constitutes a congressional waiver of the government's immunity to liability for interest; nor would any language in the Act or the decisions under it warrant such a suggestion. See *Pawnee Indian Tribe of Oklahoma* v. *United States, supra; Confederated Salish & Kootenai Tribes* v. *United States, supra; Nez Perce Tribe of Indians* v. *United States, supra.*

Against this background it may be seen that the issue presented for decision here is very narrow: Did the Treaty of 1854 constitute an affirmative undertaking to pay interest on money which has now been held to be owed petitioners? No other treaty, act or contract is relied on. And no right to interest could be conferred by the conduct—or even the dereliction—of federal officers in the absence of such an undertaking. See *United States* v. *N.Y. Rayon Importing Co.,* 329 U.S. at 660–661. We therefore turn to the Treaty of 1854.

B. THE TREATY OF 1854 DID NOT OBLIGATE THE UNITED STATES TO PAY INTEREST

1. Petitioners' ultimate reliance is on the following language of Article 7 of the Treaty of 1954 (10 Stat. 1084):

> * * * it is agreed that the President may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them * * *.

On its face, this is not an undertaking by the United States to pay interest; rather it appears to be an undertaking prudently to invest some portion of the tribe's money and to pay over whatever income is realized.[4] In contrast, many other Indian treaties did provide for the payment of interest by the United States at specified rates on funds deposited in the federal Treasury;[5] such treaties unmistakably constituted obligations of the United States for the interest specified. *United States* v. *Blackfeather,* 155 U.S. 180.

The dissenting opinon below argues (A. 77–78) that,

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[4] We do not, of course, quarrel with the proposition that the terms "stocks" and "interest" should be understood to include bonds or other securities and dividends or other income, respectively.

[5] The treaty of August 1831 (7 Stat. 355, 357) with the Shawnee Indians, which was construed in *United States* v. *Blackfeather, supra,* provided that the proceeds of the sale of certain lands, after specified deductions, should "constitute a fund * * * on

notwithstanding its apparent meaning, Article 7 should be read as obligating the United States for interest because, prior to 1854, "the Federal Government construed similar agreements calling for investment in 'safe and profitable stocks' yielding 'interest' of not less than five percent as being satisfied by an appropriation, from year to year, of a sum equal to five percent interest. See Annual Report of the Commissioner of Indian Affairs, Nov. 30, 1852, p. 10 (H. Doc. 1, pp. 300–01); Annual Report of the Commissioner of Indian Affairs, 1853, pp. 10–12 (H. Doc. 1, p. 263)." But the conclusion does not follow from the premise. One can usually satisfy a debt by alternative methods—equivalent or more advantageous than the method specified—although the creditor cannot compel it. Thus, assuming the obligation to invest could be discharged by annually appropriating a sum equivalent to the yield the investment would have earned, this does not mean that the Indian beneficiaries had an enforceable claim for payments in lieu of bond interest, binding upon the federal Treasury. What is more, the very reports of the Commissioner of Indian Affairs cited by the dissent below led to a change of approach. In both of the reports cited, the Commissioner suggested discontinuing the practice of holding Indian funds in the Treasury. He urged that ac-

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which the United States agree to pay to the chiefs * * * five percentum * * * as an annuity." See, also, Agreement with the Nez Perce Indians, 28 Stat. 326, 329, considered in *Nez Perce Tribe of Indians* v. *United States*, *supra;* Act of January 14, 1889, 25 Stat. 642, 645 considered in *United States* v. *Mille Lac Band of Chippewas*, 229 U.S. 498.

tually investing the principal would be advantageous, "first, in absorbing a considerable portion of the present large and useless surplus of funds accumulated in the treasury"; second, "in relieving the government from the payment of the immense sums which the annual interest and payments on the above-stated principals must eventually amount to"; and third, in "diffusing, as it would, a considerable sum throughout the country" thereby benefiting "the States whose stocks might be selected," as well as "the community generally" and "keeping at home" securities "which might otherwise have to be sent abroad." Report of the Commissioner of Indian Affairs, November 26, 1853, S. Doc. 1, 33d Cong., 1st Sess., p. 263.

The policy recommended by the Commissioner in 1852 and 1853 was adopted and followed for many years thereafter.[6] The Peoria treaty did not prescribe a five percent interest rate, apparently because of "the possibility of a greater amount obtainable from private investments" (A. 78). A substantial portion of the proceeds of the land sales were invested in the bonds of various States and at various rates of return. See Def.'s Exh. 9–13, pp. 117–118. The investments thus made were not, of course, immune from the risks to which securities generally are subject. In several instances, particularly during the Civil War, States whose bonds had been purchased defaulted. See Letter

[6] The Act of April 1, 1880 (21 Stat. 70) marked a return to the earlier practice. It authorized the deposit of Indian funds in the Treasury to earn interest at the rate specified in the several treaties, or if none were specified, at the rate "prescribed by law."

from the Commissioner of Indian Affairs, May 23, 1864, S. Mis. Doc. No. 117, 38th Cong., 1st Sess.; Letter of the Secretary of the Interior, June 24, 1864, S. Mis. Doc. No. 133, 38th Cong., 1st Sess., p. 3. While Congress eventually indemnified Indians for the losses occasioned by those defaults (see Def.'s Exh. 9–13, pp. 117–118), such appropriations were a matter of grace and were in no way required under the 1854 treaty.[7]

In sum, we submit that under Article 7 of the Treaty of 1854, the United States undertook to manage an investment portfolio. It did not obligate itself to pay interest at any stated rate or at all. On the contrary, the treaty reflected a clear determination to avoid obligating the Treasury for interest payments. In these circumstances, the court below and the Indian Claims Commission were surely correct in concluding that the treaty does not support petitioners' demand for interest, over a period of 110 years, on the $172,726.04 awarded them.

2. Even if we were to assume that Article 7 is an undertaking to ~~invest~~ pay interest on funds rather than an undertaking to ~~pay interest on~~ invest them, we submit that the treaty does not authorize the allowance of interest on the underlying award in this case. There remain several obstacles.

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[7] Similarly, Congress appropriated $169,686.75 to replace securities that had been stolen (12 Stat. 539–540 (1862)). At least in the absence of custodial negligence, we do not suppose that the United States was obligated to indemnify the Indians for the stolen securities.

At the outset, it is not immediately apparent that an obligation to pay interest on retained proceeds received from the sale of lands survives to the present award, which does not represent money that was received by the United States, but, rather, money that should have been received and was not. Since Article 7 is concerned only with the proceeds of the sale and makes no provision with respect to the disposition of other funds, it affords no guidance here.

Notwithstanding this difficulty, if the treaty had included an express and unequivocal command to pay interest at a specified rate, it would be a simple arithmetic exercise to determine the amount that should have been earned. *United States* v. *Blackfeather,* 155 U.S. at 192–193. But the command of Article 7, if it is a command, is not of that sort.[8] The amounts that were to be invested and the amounts that were to be paid out to the Indians were left to be determined by the President "from time to time, and upon consultation with said Indians." The dissenting opinion below (A. 78) suggested that it was "very unlikely" that

[8] We do not urge, and the court below did not hold, that Article 7 left the President free to do nothing with the money—neither investing it nor turning it over to the Indians (see A. 77 n. 2). It is, nonetheless, indicative of the scope of the discretion conferred upon the President that a discretionary authority to withhold funds, independent of that provided in Article 7, is contained in Article 9 (A. 106): "* * * And should any of said Indians become intemperate or abandoned, and waste their property, the President may withhold any moneys due or payable to such, and cause them to be paid, expended or applied, so as to ensure the benefit thereof to their families." Article 9 would not seem to require the investment of funds being held for "intemperate or abandoned" Indians.

the President would have paid over the $172,000, had it been available in 1857, "without retaining any for investment." But it is also unlikely that the President would have invested the whole amount, since the allocation of the total fund between the short-term and long-term needs of the tribe was undoubtedly influenced by the size of the fund. Petitioners' contention, which we do not dispute, that the President was obliged to exercise his discretion in a manner most favorable to the Indians (Br. for Petitioners, pp. 7–8), only begs the question; it cannot tell us what allocation could reasonably have been deemed most favorable. Whatever the likelihood of any particular allocation, however, the critical fact is that it is impossible to do more than speculate as to what would have happened had a larger fund been available. The imposition of a liability for interest predicated on such a conjecture would be wholly inconsistent with the rule discussed above (pp. 8–11, *supra*) that interest is payable only on the authority of an explicit and unequivocal congressional mandate. See *Nez Perce Tribe of Indians* v. *United States*, 176 Ct. Cl. at 830. The Treaty of 1854 supplies no such authority.

Furthermore, even if one could divine the proportion of the present award that the President would have allocated for investment, had it been available in 1857, there is no way by which we can determine how the money would have been invested—in what securities, at what rate, and with what success. As we have noted above (p. 14, *supra*), the bonds that were purchased bore various interest rates. Some fell into

default. Others were sold at premiums. We need not elaborate on the fact that the actual results of the most prudent investments cannot be predicted with complete confidence. Here again, petitioners' claim rests on the sort of conjecture and surmise that cannot support the imposition of a liability for interest on the United States. Indeed, the most vivid demonstration that the Treaty of 1854 does not support their claim is contained in the very words of petitioners' prayer. Petitioners request this Court to direct the entry of "an additional judgment * * * for interest, on $172,726.04, at the rate of 6 percent from June 1857, the date of the last sales, through 1860; 5 percent from 1860 to November 9, 1934, and such rate of interest the Court deems appropriate thereafter" (Brief for Petitioners, p. 19). The Treaty, however, says nothing about interest at 6 percent or at 5 percent, much less at such rate as the Court deems appropriate. The fact that it is impossible to determine what rate of interest is authorized is a strong indication that Congress has not made the United States liable for interest in this case.

3. The difficulty in finding support for petitioners' claim in Article 7 is not the result of any ambiguity or obscurity in the language of the treaty and cannot, therefore, be obviated by resort to canons of construction. Petitioners' contention (Brief, pp. 15–17) that the treaty must be construed against the party that drew it seems to us beside the point because there is really no doubt as to what the treaty means. The difficulty is precisely that the treaty does not

provide for the circumstances presented here and cannot be made to do so by any reasonable process of interpretation. The treaty authorizes the payment of the interest realized in an explicitly defined set of circumstances that do not obtain here. The fund involved here was not received for the sale of land; it was not allocated by the President for investment; and it was not invested. The fact that the failure to satisfy those preconditions is attributable to the failure of the United States to sell the lands in the manner prescribed by the treaty cannot support the conclusion that Congress made the United States liable for interest in circumstances not contemplated by the treaty. Every claim against the United States is based on some dereliction or default, but interest as an element of damages is not recoverable in the absence of explicit assent. Since Article 7 makes no provision for the present situation, the case is no different than one in which the United States wrongfully fails to make a payment for which it is liable. Clearly a judgment for interest on the principal sum may not be entered in such a case. *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654; *Albrecht* v. *United States*, 329 U.S. 599; *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48; *Cherokee Nation* v. *United States*, 270 U.S. 476, 491.

Were this an action between private parties for money due, the failure of the underlying agreement to provide for interest on the claim would be no obstacle to a judicial award of interest. See *Miller* v. *Robertson*, 266 U.S. 243, 257–258; *Royal Indemnity Co.*

v. *United States*, 313 U.S. 289. But that is not the situation. The sovereign immunity of the United States exempts it from liability for interest on claims against it unless and until Congress expressly waives that exemption. Congress has not done so here.

CONCLUSION

For the foregoing reasons, the decision of the Court of Claims should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
HAROLD S. HARRISON,
Acting Assistant Attorney General.
ROBERT S. RIFKIND,
Assistant to the Solicitor General.
ROGER P. MARQUIS,
WILLIAM M. COHEN,
Attorneys.

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